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The East India Company and Criminal Justice: The Role of Orientalists.

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ABSTRACT: *The East India Company brought several changes to the legal system of India, which was necessitated by the colonial project and the need to sustain India's local legal traditions. Liberalism and Orientalism dictated the course of British experimentation in the field of law in India to a great extent. This paper deals with the forces of politicalthought wich shaped the course of colonial law and jurisprudence in India.*

KEYWORDS: *East India Company, Colonial Law, Warren Hastings*

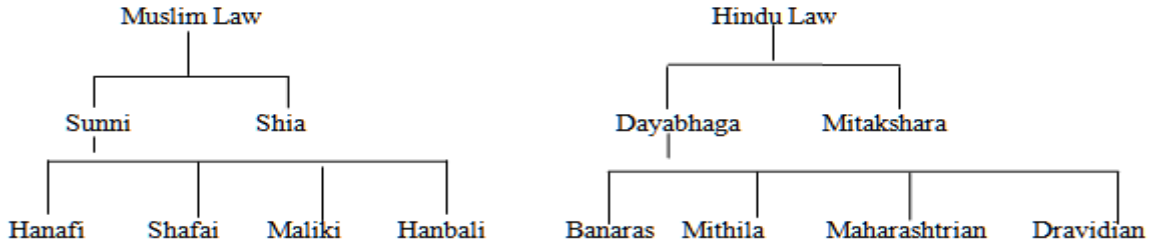
I. INTRODUCTION

The coming of the East India Company and its need to strengthen its empire in India needed a bedrock of validation other than its military might. In order to justify its control over its Indian possessions, in the latter half of the 18th century it had to "device a vision at once of India's past and its future" to design an effective administrative and legal structure.[1]The British legal system imposed on India was neither totally European in character nor did it leave the Indian legal system untouched. With the grant of 'Diwani' rights in 1765, the East India Company was given the land revenue rights and administrative rights to civil justice in newly acquired Bengal. One of the prevailing questions faced by the Company was the dilemma over the status of the prevailing judicial structures in the province. It was important to decide whether the old judicial system was to be retained or a new system, based on judicial law should be introduced. Some in the EIC realized that a somewhat workable mixture of European and indigenous legal structures was also possible.Back in Britain, the capacity to assess and collect taxes was totally contingent on the backing of existing legal systems as the courts guaranteed and protected property rights.Warren Hastings, after taking charge as governor general in 1772, planned to establish a competent network of courts ,especially since they were needed to help in the liquidation of debts at interest, to deal with disputes between raiyats and farmers or between farmers and government officers, and to decide complex questions of inheritance. However, the institution of new law courts had raised new questions of legality and authority. The pre-existing law courts represented the supposed despotic and degenerate nature of Mughal and nawabi rule in the minds of Company servants. As opposed to this, many company servants regarded a sudden introduction of a European legal system as impractical. Another strategic question facing the Company was the question whether it possessed the required political authority to totally restructure local judicatures.Warren Hasting's solution was to work on improving existing courts, rather than totally reshaping their authority.

The judicial plan of 1772 created two chief courts for Bengal -a *diwani sadr adalat* (chief civil court) and a *nizamat sadr adalat* (chief criminal court). Seated in Calcutta, these two courts were supposed to act as the court of appeal for lower civil and criminal courts sitting in the districts of Bengal. In addition, each district was to have two courts -a *mofussil diwani adalat* 'for the Cognizance of Civil Causes' and a *faujdari adalat* 'for the trial of all Crimes and Misdemeanours'.[2]The new judicial system saw a curious delegation of power between Indian and European officials. Company officials, senior council memebers in the chief adalat and the district collectors were to preside over the civil courts. In the criminal court system, which would remain a part of the nizamat branch of government under the old Nawabi order, a continuity was maintained as Qazis and Muftis (the Muslim law officials) were to preside,despite the fact that even these criminal courts would come under the supervision of the Governor-General.The 1772 judicial plan was centred on the programme to preserve indigenous laws of India. It is important to locate the nature of the debates over Indian law that the East India company legal reforms sought to address. It was a commonly held belief among many British observers of Indiathat Indians were 'governed by no other principle of justice than arbitrary wills, or uninstructed judgements'. [3] Hastings, however was critical of this view of 'Oriental Despotism' and argued that for both Hindus and Muslims there were extensive bodies of legal texts and commentaries and the "ancient constitution" of Bengal was very much intact. The logic of Hastings' argument made it necessary that these ancient legal texts be made accessible to the British judges.

He believed that the study of ancient Indian learning would not only be a 'gain of humanity', but would also 'lessen the weight of the chain by which the natives are held in subjection'.[4] To this end, Hastings persuaded "eleven of the most respected pandits in Bengal" [5] to compile from the shastric literature on Hindu law a code that could be translated into English for the newly appointed judges to use. The English translation by N. B. Halhed was published in London in 1776 as *A Code of Gentoo Laws*; or, *Ordinations of the Pundits*. Hastings believed that the topics covered –debt, inheritance, civil procedure, gift, slavery, sale, defamation, assault, theft, violence, adultery, duties of women,etc. – would be useful in the district courts. The Orientalist tradition led to the founding of institutions like the Calcutta Madrassa (1781), the Asiatic Society of Bengal (1784) and the Sanskrit College in Benares (1794), all of which was meant to promote Indian languages and scriptures. Many of the researches and papers were published as monographs, with many more in *Asiatick Researches*, a periodical of the Asiatic Society of Bengal.However, the Orientalist scholars made certain fundamental assumptions that had a far reaching impact on all subsequent British understanding of India. Deriving inspiration from the Roman Empire that allowed its subjects the free practice of their own religion and civil jurisdiction, theyemphasised the policy of tolerance on the part of the British towards the conquered Indians.However, they presumed that Hinduism was a coherent religion, like Christianity, and that its doctrinal core was to be found in ancient Sanskrit texts. For advice on interpretation of the texts, they turned to the 'priests' of the religion, the Brahmins. Besides, they set for themselves the project of identifying a fixed body of knowledge that could then be codified into Hindu and Muslim law. Scholars like William Jones believed that the earliest legal texts were the most authoritative, for the later ones became corrupt by accretions and commentaries. This view of Hindu law implies that the Hindus led a timeless existence. Thus, though the notion of Oriental despotism received a jolt with the discovery of ancient legal texts, India continued to be viewed as a quintessential 'Oriental' land, the 'Other' of Europe.

Besides, the Orientalist scholars were tired of their dependence upon the native interpreters who could easily mislead them. Jones' distrust of Indian scholars' interpretations of their own legal tradition led him to an ambitious project to compile a "complete digest of Hindu and Mussulman law".The English translation was completed by H. T. Colebrooke and published as *The Digest of Hindu Law on Contracts and Successions* in Calcutta in 1798.Colebrooke suggested that prescriptive norms could be best found in collections called *sanhitas* and *mimamasa*. Besides, the solution to the problem of conflicting interpretations was to suggest that there were regional variations or differences. However, he mistakenly drew as analogy between Hindu and Muslim laws, yielding a symmetrical set for Hindu law to match what were thought of as the schools of Muslim law.



In the sphere of criminal justice, the Company officers decided to administer Islamic law in Bengal. Thus they first sought to establish the legitimacy of their rule and disguise their presence, and later to secure co-operation of the ruled and exercise their power more forcefully. By saying that Muslims were 'governed' by Islamic law, the British tried to conceal the fact that they had supplanted the Mughal sovereignty. This legitimacy was essential to stave off insubordination and resistance. Besides, to blur the distinction between Mughal and British rule, the British presumed that they could administer Islamic law as easily as the Mughals. Thus as Kugle points out, "the shariah was largely codified by the British as an act of wresting power away from Muslims, while later Muslims sought to regain political power through rhetoric justified by this exact 'colonized' shariah".[6] Moreover, the process of translation and codification was largely informed by Orientalistand imperialist assumptions, which so shaped Islamic jurisprudence as to fit the needs of a modernizing, centralising state. Thus, British reordered both political and legal structures, while keeping up the pretence of continuing Mughal institutions.They condemnedthe jurisprudence under the Mughals amd nawabs as disorderly, arbitrary, and cruel in order to justify their own seizure of political authority. However, the British were more critical of the stated laxity of the indigenous rulers in exercising their punitive rights, rather than the 'barbarity' with which they did so. In a similar vein, the Islamic law, as it was applied in the Company's criminal courts, was criticized for the limitations it seemed to place on the state's powers of persecution and punishment.[7]In the course of the 19th century, as the state bureaucracy solidified, the Anglo component

became stronger in the Anglo-Muhammadan law. Thus, the company's organisation of courts and procedurefollowed more closely the pattern in Britain than that in Mughal India. Moreover, the British rendered the local options for adjudication unviable by co-opting the qazis within a bureaucratic structure and thus cutting them off from the local context. Moreover, the authority of the qazis was further eroded as the translated legal texts became increasingly available to the British judges. Animated by the preponderance of Orientalist scholars in their ranks, the leadership of the Company assumed that Islamic law was a code of law to be found in an authoritative text. The notion gave birth to the project to translate and codify Islamic legal texts. However, as these texts proved insufficient and did match up to the earlier expectations,magistrates and administrators then resorted to the strategy of recording and publishing the decisions of these Anglo-Muhammadan courts in case-books of court proceedings. Thus, a uniformity in court decisions was sought to be established by binding Islamic law to precedence.

Many important changes were brought about in the legal sphere during the term of Lord Cornwallis as governor-general. Whereas Hastings had always professed a high opinion of Indian administrators, Cornwallis slipped into the language of native depravity. Moreover, now the company sought to shed its troubled image by laying the burden of its corrupt practices at the door of its native officials, who were now removed from all important posts. The vortex of racial attack also engulfed the Eurasians who were barred from serving at important positions. Though illegal profiteering was vigorously pursued and private trade by company officials banned, there was a compensatory increase in their salaries. In the years that followed, legislation continued along the lines developed by Cornwallis, on the basis of the enquiry of 1789-90. The British sought to abolish what they considered cruel and arbitrary punishments by tightening the existing measures, and removing religious and social privileges. However, defying these concerns, Regulation 16, 1795 thatextended the criminal law enacted for Bengal to the Province of Benares, provided that "no Brahmin shall be punished with death". Instead he was liable to transportation. Clearly it was a measure dicated by the exigency to not alienate the Brahmins in their own stronghold.

However, Regulation 21, 1795 introduced a new element into legislation by prohibiting the practices of dharna and kurh. Dharna denoted the practice of sitting indefinitely at the door of someone who had not performed an engagement, usually a debtor,neither eating nor drinking. Moreover, the person sitting dharna often threatened to wound or kill himself, the blame for which would fall on the debtor.Kurh, on the other hand, was a practice in whichthe endangered person constructed a circular enclosure with a pile of wood, usually placed an old woman on it, and threatened to set fire to the wood if he should be harmed. In other cases he threatened to wound or kill himself or his wife or children either to avoid arrest or to enforce some demands. Now the attempt to sit dharna or to establish a kurh was subjected to punishment and, if carried out, considered as murder. The same regulation also prohibited infanticide. While the prohibition against dharna and kurh can be seen in the context of securing law and order, the prohibition of infanticide and child sacrifices can be attributed to humanitarian concerns.[8] These practices were extremely shocking to British sensibilities. And even in the case of dharna and kurh, sympathy with the victims was probably not lacking. Moreover, as the legislators were anxious not to hurt religious feelings, dharna and kurh were represented as consequences of a corrupt Hinduism, while infanticide and child murder were said to be not sanctioned by Hindu law.

Liberalism – shaped by the ideas of free traders, evangelicals, and utilitarians for the 'improvement' of India – gained strength in India with the inauguration of Lord William Bentinck's term as Governor-General in 1828. The liberals embarked upon the cultivation of British institutions on Indian soil, most important being private property, the rule of law, individual liberty, Western education, and so on. This reformist sentiment remained strong from Bentick's time to that of Lord Dalhousie (1848-56).The British derived great satisfaction from their self-perception as the reformers of Indian morality. Following the cue given by James Mill, that the greatness of a civilization can be gauged from the position it accords to its women, the British set for themselves the task of 'rescuing' India's 'degraded' women. The practice of sati began to be seen as reflective of India's various social maladies. Moreover, though the Victorian thinkers themselves presented the image of an ideal woman as innocent, demure and self-sacrificing, the difference from Indian ideals could only be avowed by a sustained attack on sati as barbaric and inhuman. As the British were wary of interfering with Hindu practices, they sought scriptural sanction for prohibiting sati. Thus, though the decision to outlaw sati was informed by the colonial notions of India's past and its religion, Bentinck ostensibly projected it as a measure to 'restore' Hinduism to its pristine form.[9]

In the domestic sphere, the British reconstituted patriarchy instead of undermining it. Under the premise of the rule of law, a man could not inflict serious physical injury on a female relative or his servant or slave with impunity. However, the male accounts of 'shame and disgrace', 'sudden anger' and 'great provocation'were treated as extenuating circumstances in colonial law courts.The Company'sreluctance to

interfere in the domestic sphere was also informed by its efforts to best utilize its institutions and resources for its own priorities of rule, though it was ostensibly tom-tommed as the Company's concern for family life and Indian civilization. Thus, the company often used the Indian family life as a ploy to escape its responsibilities. For instance, the government's reluctance to assume responsibility for poor relief or insane asylums was justified on the ground that the Indian families looked after their poor and their lunatic. Moreover, the argument frequently given against the abolition of slavery was that it connoted a 'mild domestic servitude' in India that was becoming even milder under Company rule, because the masters were now aware that any act of cruelty would be punished by law.

The growing confidence of the Company with the establishment of its paramountcy over large parts of the subcontinent was articulated through sustained campaigns against criminal communities, like that against thugee. The Thugee Act XXX of 1936, that made thugee an offence without defining the term, had many novel features. Applied retrospectively, the law extended the jurisdiction of the Company's courts to territories outside the Company's control. The trial of the offence was freed from the encumbrance of the Islamic law, and could be carried out in any court irrespective of the site of the offence committed.There was no clamour from the company's Indian subjects to eradicate thugee, nor is there any indication that the menace had reached crisis proportions. Moreover, the thugs did not attack British parties. However, the campaign to root out thugee found favour with all shades of British opinion. Though there was an obvious concern to safeguard the Company's opium trade and to ensure the security of the Company's soldiers moving through he region, the campaign against thugee, above everything, reflected the new role set out for an all-India paramount power that alone could extirpate this 'scourge'.[10] Thus, not surprisingly, the eradication of thugee was feted as a great success by the Company's government.

In the 1830s and 1840s the process of penal reforms was set in motion. To begin with, public display of pain and ignominy, including public executions, gibbeting,flogging, and labour on roads, was considered an essential deterrence against crime, though the courts always took account of rank and status before inflicting such punishments. However, gradually objections began to creep against public punishment. It began to be argued that the cruel spectacles evoked sympathy for the offender and associated law with torture, thus undercutting its legitimacy. Thus, these utilitarian calculations led to a gradual obsolescence of public punishments.As for the formulation of prison regime, cost-cutting and the need for an effective utilisation of prison labour were obvious motives, but humanitarian motives were also an important factor in goading the British towards reforms.

VIII. CONCLUSION

In the sphere of criminal law, the East India Company continued with the Islamic law -- with the exception of the Bombay Presidency where the Hindu law came in force – that was in practice in pre-colonial India. Thus, the Company ostensibly let the Indians in possession of their own laws, the replacement of which by the English law would have been both unjust as well as impolitic. The Orientalist scholarship, to its credit, unravelled and codified the ancient law codes, thus posing a challenge to the unfounded conception of India as a land of 'Oriental despotism'. However, in a broader framework, the Orientalist enterprise was part of the "colonial project of control and command",and it could never break free of its own preconceived notions of India's past and her religions.[11]The result was that the Indians enjoyed their own laws, but so purged and improved by the British who had abolished those elements which were contrary to humanity, reason, and justice that they approximated more closely to the English law than any measure that had been in force in Mughal India. Thus, to quote Bernard Cohn, "What had started with Warren Hastings and Sir William Jones as a search for the 'ancient Indian constitution' ended up with what they had so much wanted to avoid – with English law as the law of India".

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